



In the  
Supreme Court of the United States

1978 Term

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No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a  
LAMINATING COMPANY OF COLORADO,  
and d/b/a  
AMERICAN LAMINATING COMPANY,  
PETITIONER,  
v.  
CENTURY LAMINATING, LTD.,  
RESPONDENT.

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SUGGESTION OF MORTGAGE

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MOTION TO DISMISS

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To the Honorable Chief Justice and Associate  
Justices of the Supreme Court of the United  
States:

CENTURY LAMINATING, LTD., the Respondent  
herein, hereby moves the Court for an Order dis-  
missing the Petition of the Petitioner, and in  
support thereof the Respondent states that this  
cause is moot and not meritorious of further  
consideration.

## MOTION TO DISMISS

The Respondent in the above-entitled case files this Motion to Dismiss to advise the Court of certain facts which, in Respondent's view, render this cause moot and not meritorious of further consideration.

The question which Petitioner seeks to raise in his Petition for Certiorari, which was granted on October 9, 1979, is:

Where a Notice of Appeal is filed prior to the entry of final judgment, may an Appellate Court accept the Notice of Appeal as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing of the Notice of Appeal deprive the Appellate Court of jurisdiction?

At the time Respondent submitted its Response to Petition for Writ of Certiorari herein, it was unaware that Rule 4 of the Federal Rules of Civil Procedure had just been amended. The changes thereto promulgated by this Court became effective on August 1, 1979. Rule 4 now states, in pertinent part:

- (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above (emphasis added).

Here, there was a Rule 50 motion pending at the time the Notice of Appeal was filed in the District Court, and it was therefore filed prematurely. No new Notice of Appeal was filed after the denial of the Rule 50 motion. Thus, it is apparent that the change in Rule 4 of the Federal Rules of Appellate Procedure by this Court has answered the question raised by Petitioner in favor of Respondent. Although the Rule has no retroactive effect by its terms to cases prior to its enactment, this Court has no reason to be briefed any further on the merits of premature appeals nor to hear oral arguments on the issue. By promulgating the change in Rule 4, this Court has expressed its disfavor of premature appeals. This Court has already considered this issue thoroughly, and the expenditure of further time by this Court would not be warranted.

For these reasons, Respondent suggests that the issue sought to be raised has become moot and retrospective only and that therefore the Writ heretofore granted should be dismissed and the Writ requested by the Petitioner should be denied.

Respectfully submitted,

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